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Supreme Court

OF THE

United States.

OCTOBER TERM, 1903.

No. 816. 53.

NATIONAL EXCHANGE BANK OF TIFFIN OHIO,
Plaintiff in Error,
vs.
SOLON L. WILEY,
Defendant in Error.

Brief for Defendant in Error.

IN ERROR TO THE

Supreme Court of Nebraska.

JAMES H. McINTOSH,
Attorney for Defendant in Error.

18967

Supreme Court

OF THE

United States,

OCTOBER TERM, 1903.

No. 316.

NATIONAL EXCHANGE BANK,
OF TIFFIN, OHIO,
Plaintiff in Error,

vs.

SOLON L. WILEY,
Defendant in Error.

Brief for Defendant in Error.

STATEMENT OF THE ISSUES.

MAY IT PLEASE THE COURT,—

This is a writ of error to the Supreme Court of the State of Nebraska, to review a judgment of that Court affirming a judgment of the trial Court involving the validity of a judgment of the Court of Common Pleas for Seneca County, Ohio, on the ground that the

Nebraska Court failed to give full faith and credit to the judgment of the Ohio Court.

This suit was brought by the Bank against Wiley in the District Court for Douglass County, Nebraska, upon an alleged judgment plaintiff claimed it had recovered against Wiley in the Court of Common Pleas for Seneca County, Ohio. The defendant interposed several defenses, all of which the Court excluded on the trial except the single question as to whether or not the Ohio Court, in which the plaintiff's judgment was alleged to have been recovered, had jurisdiction to to render a judgment against Wiley as alleged. This question of jurisdiction the Court submitted to the jury on the evidence, under appropriate instruction, and the jury returned a verdict for the defendant, upon which judgment was duly entered.

The Ohio Judgment on a Cognovit Note.

The alleged judgment of the Ohio Court was founded upon the following note (Exhibit A. p. 82):

"$10,000.00 TIFFIN, OHIO, Ap'l 26, 1884.

"October 1, 1884, after date, for value received, we jointly or severally promise to pay the National Exchange Bank, or order, at its office in Tiffin, Ohio, Ten Thousand Dollars with 8 per cent interest after maturity. And hereby authorize N. L. Brewer, or any attorney at law in the United States, or elsewhere, to appear before any court of record, after the above obligation becomes due, and waive the issuing and service of process, and confess judgment against us, or any or either of us, in favor of the holder of this instrument for the amount then appearing due together with the cost of suit, and thereupon to release all errors, and

writs of errors, and waive all right to appeal, and stay of execution, in our behalf or in behalf of either of us.

"WILEY CONSTRUCTION CO. (SEAL)
"S. L. WILEY, Pres't (SEAL)
"S. L. WILEY (SEAL)"

Said note is indorsed on the back as follows:

"45170 May 9, 1887. Paid on the within $6311.75."

This note was due October 1st, 1884. Under date of May 9th, 1887, it bore the endorsement of a payment of $6,311.75, and yet, on the 31st day of July, 1899 (p. 81) Lutz & Lutz, Attorneys for the Tiffin National Bank, filed a petition in the Court of Common Pleas of Seneca County, Ohio, in the name of the National Exchange Bank of Tiffin, Ohio, against Wiley Construction Company and S. L. Wiley, on said note, and on the same day, July 31st, 1899, John Bender assumed to enter the appearance of the defendants and to answer for them, confessing judgment for the amount the plaintiff wanted him to, and releasing error, and on the same day, July 31st, 1899 (p. 83) the following entry was made in the Journal of said Court of Common Pleas of Seneca County, Ohio, to wit (p. 83):

"National Exchange Bank of Tiffin, Ohio, Plaintiff, vs. Wiley Construction Company and S. L. Wiley, Defendants. } Cognovit

"This day came the plaintiff by its attorneys; also appeared in open court, John Bender, an attorney at law of this court, and by virtue of the warrant of attorney annexed to the note attached to the petition in said cause, shown to have been duly executed by said defendants, entered the appearance of said defendants, and waived the issuing and service of process in

this action, and confessed a judgment on said note against said defendants, and in favor of said plaintiff, for eleven thousand, four hundred and nineteen dollars and sixty-eight cents, being the amount of principal and interest due on said note, and for the costs taxed and to be taxed, and released and waived all exceptions, errors and right of appeal in the premises.

"It is therefore considered that said plaintiff recover of said defendants the sum of eleven thousand, four hundred and nineteen dollars and sixty-eight cents, being the amount of said note with interest computed at 8 per c nt per annum, from the 9th day of May, A. D., 1887, and also its costs herein expended taxed at $6.50."

Three days after said judgment entry was made in Ohio the plaintiff commenced this suit in Nebraska.

It will be noticed, said judgment purports to have been rendered in favor of the plaintiff and against the defendants, Wiley Construction Company and S. L. Wiley, pursuant to the appearance and confession of the defendants entered in said cause by one John Bender, Attorney at Law. This suit was brought in Nebraska against Wiley alone, his co-judgment debtor, if there was a judgment, not being made a party defendant.

The Defense.

In the Nebraska Court, the defendant, among other defenses, answered as follows (14):

1. That said defendant denies that the said plaintiff is or was a corporation, and denies each and every allegation in the plaintiff's petition contained.

2. This defendant further answering says that on the 26th day of April, 1884, Wiley Construction Company, as principal, signed a promissory note for $10,000, payable to the order of the National Exchange Bank. due October 18th, 1884, with eight per cent. interest after maturity; that on said 26th day of April, 1884, the name, S. L. Wiley, was signed to said note; that there never were any other signers to said note; that it was understood and agreed between all the parties interested in said note that if any liability at all should accrue to S. L. Wiley by reason of the premises, said liability should be, and should continue to be, secondary, and that of, to wit, indorser; that no consideration ever accrued to said S. L. Wiley, for anything done in or about said note; that on, to wit, the 2nd day of March, 1885, the Tiffin National Bank purchased, received, and became the holder of said note, thence has been and still is the holder thereof, and said plaintiff has never been the holder thereof, or in any way interested therein; nevertheless, this defendant is informed and believes, and upon information and belief states, that said note forms the basis of the pretended judgment upon which said plaintiff now brings this suit.

6. This defendant further says, upon information and belief, that whatever judgment, if any, purports to have been rendered in Seneca County, Ohio, upon said note, was against the signers thereof, jointly, and not against them severally, nor against them one as principal, and the other as indorser or surety.

Wherefore the said plaintiff ought not now be permitted to maintain this suit.

The Trial.

On the trial, the only defense the Court entertained was the defense that the Ohio Court had no jurisdiction over the defendant in the case in which the judgment was alleged to have been rendered.

This defense was presented pursuant to paragraphs one and two of the answer above quoted, the Trial Court ruling that if the plaintiff in the Ohio suit was not, at the time the suit was brought, the holder of the note in question, then the attorney-at-law assuming to enter the defendant's appearance and confess judgment against them was not their agent. The question as to whether or not the plaintiff in the Ohio suit was the holder of the note was duly submitted to the jury upon proper instructions, and a verdict returned for the defendant.

In reviewing the judgment, the Supreme Court of Nebraska summarized its views in the third paragraph of the syllabus, which, according to the practice in that State, is written by the Court, as follows (p. 87):

"In an action on a foreign judgment taken under a warrant of attorney authorizing any attorney at law to appear in any court of record, and confess judgment against the makers of a certain note, in favor of the holder thereof, *Held* (1) That such warrant was not a general authority to appear and confess judgment, in any action instituted on the note, but was limited to the confession of a judgment in favor of the holder; (2) That the defendant was not estopped by the judgment to deny that the plaintiff was the holder of the note when such judgment was confessed; (3) That a judgment confessed in favor of one who at the time was not the holder of the note, was void for want of jurisdiction."

BRIEF OF THE ARGUMENT.

I.

Answer to the Plaintiff's First Point.

The plaintiff's first point is (Brief, p. 14), that the "Answer does not state a defense to the plaintiff's petition, but instead confesses same."

The several defenses in the answer are not separately stated and numbered, but the first paragraph of the answer is a general denial.

The second paragraph alleges that ever since March 2, 1885, the Tiffin National Bank, and not the plaintiff, has been the holder of said note. This paragraph of the defense expressly put in issue the question as to whether or not the plaintiff in the Ohio suit was the holder of the note at the bringing of that suit, and therefore put in issue the question as to whether or not John Bender was Wiley's agent to enter his appearance and confess judgment; for Wiley only appointed an agent as between him and the holder of the note, and not as between him and any third person.

The sixth paragraph of the answer, too, wherein it is stated in substance that if there was a judgment in Ohio it was a joint judgment against Wiley and the Wiley Construction Company, and therefore this joint judgment could not form the basis of a separate suit against Wiley alone, stated a good defense to the plaintiff's petition.

II.

Answer to the Plaintiff's Second Point.

The plaintiff's second point is (Brief, p. 17), "That in any view of the case there is no evidence in support of the defendant's contention that the plaintiff was not the holder of the note in the Ohio Court."

The record shows that as far back as March, 1885, the National Exchange Bank sold and delivered this note to the Tiffin National Bank, of Toledo, Ohio, which ever since has been the owner and holder thereof.

The charter of the National Exchange Bank expired March 1, 1885 (Ex. A p. 58). At a meeting of its Board of Directors held February 24, 1885, the following business was transacted, as shown by the record of the meetings of the Board of Directors of said Bank, to wit (p. 67):

"WHEREAS the corporate existence of this Bank expires by limitation March 1st, and will be succeeded by the Tiffin National Bank,

"On motion the full board of directors of this bank were appointed to confer with a like committee from the Tiffin National Bank, and agree upon a value to be placed on the *transferable assets* of this bank, including bank building, and U. S. Bonds to be sold to Tiffin National Bank."

The Tiffin National Bank was a banking corporation formed about the time the charter of the National Exchange Bank expired, but with stockholders substantially the same as the stockholders of the National Exchange Bank (p. 44).

The Committee appointed at the above February 24, 1885, meeting of the Board of Directors of the National

Exchange Bank, reported at the meeting of said Board held March 2, 1885, as follows (p. 68):

"The committee appointed at the last regular meeting, presented the following

REPORT.

"TO THE DIRECTORS OF THE NATIONAL EXCHANGE BANK OF TIFFIN, OHIO:

"The committee appointed by you to confer with a like committee appointed by the board of directors of the Tiffin National Bank, and determine a value to be placed on the assets of the National Exchange Bank, to be transferred to the Tiffin National Bank, beg leave to report that they have fixed upon the following valuation:

* * * * * *

Net worth of discounts as per schedule.....$160,871.38

* * * * * *

"On motion the report of the committee was received, and the valuation of assets adopted by this Board, and the Cashier directed to execute a warranty deed for the bank building, to the Tiffin National Bank and deliver the same, together with all the other assets described in the above report to the said Tiffin National Bank."

At the time the above valuation was made, this Wiley note was one of the discounts of the National Exchange Bank (pp. 28, 47, 48, 49, 70).

After the transfer and delivery of the assets as directed at said meeting of March 2, the Directors of the plaintiff held a meeting on March 3, attended by the full board, the record of which is taken from the minute book of the plaintiff's directors, and is in part as follows (p. 69):

"Minutes of last regular and intervening special meetings were read and approved.

"The corporate existence of this bank having expired at the close of business February 28, 1885, by limitation, it then went into liquidation, the available assets having been transferred to the Tiffin National Bank."

This Wiley note, from the time of the above transfer, was in the vaults of the Tiffin National Bank (pp. 50, 73), in the custody of said bank, and especially under the management and control of Mr. Chamberlain, its Cashier (p. 73).

Very shortly before the 31st day of July, 1899, Mr. Chamberlain, Cashier of the Tiffin National Bank, took this note out of the vaults of the Tiffin National Bank and delivered it to Lutes & Lutes, attorneys for the Tiffin National Bank, for suit (p. 33).

Mr. Chamberlain pretends that in giving this note to the attorneys of the Tiffin National Bank for suit, he was acting as Cashier of the National Exchange Bank, under the direction of the Board of Directors of that Bank. He also says, however, that the Directors of the National Exchange Bank gave him this direction a few days before July 31, 1899, but during the entire year 1899 there never was a meeting of the Directors of the National Exchange Bank. Since 1885 there never had been an election of the Directors of the National Exchange Bank. Of the five men who were Directors of the Bank in 1885, two of them have since deceased, and the survivors of them were all Directors of the Tiffin National Bank.

From these facts the jury concluded that the plaintiff was not the holder of the Wiley note at the time of the entry of the judgment which forms the basis of the plaintiff's claim. Hence the Court acquired no jurisdiction over Wiley, for Wiley by signing the note merely appointed an attorney to act for him as between him and the holder of the note. He

did not appoint an attorney to act for him as between him and some one who was not the holder of the note. Therefore, if the plaintiff was not the holder of the note the attorney was not Wiley's agent.

III.

Answer to the Plaintiff's Third Point.

The Plaintiff's third point is (Brief p. 19),—that "Under the full faith and credit clause of the Constitution of the United States the judgment of the Ohio Court is conclusive that the plaintiff therein was the holder of the note."

1. The Question of the Jurisdiction of the Court, and the facts upon which Jurisdiction is based, may always be questioned, whether the findings formally recite that the Court has acquired jurisdiction or not.

Thompson v. Whitman, 18 Wall, 457, is the leading case on this subject. There Whitman sued Thompson in an action for damages for seizing and carrying away the plaintiff's sloop. Thompson justified by averring that at the time of the seizure Whitman was engaged in unlawfully gathering clams with his sloop "within the limits of the County of Monmouth," and that the defendant as Sheriff of said County "seized the sloop within the limits thereof and informed against her before two justices of the peace of said county by whom she was condemned and ordered to be sold. Whitman, in answer to this defence, denied that his sloop was seized within the County of Monmouth, thus challenging the jurisdiction of the justices, as well as the right of the defendant to make seizure."

On the trial, Thompson produced the justices record "which stated the offence as having been committed, and the seizure as made within the County of Monmouth."

Mr. Justice Bradley delivered for the court an exhaustive opinion, stating the question in the case and the conclusions of the court thereon, as follows:

"The main question in this case is, whether the record produced by the defendant was conclusive of the jurisdictional facts therein contained. It states with due particularity sufficient facts to give the justices jurisdiction under the law of New Jersey. Could that statement be questioned collaterally in another action brought in another state? * * *

"It must be admitted that no decision has ever been made on the precise point involved in the case before us, in which evidence was admitted to contradict the record as to jurisdictional facts asserted therein, and especially as to facts stated to have been passed upon by the court.

"But if it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it.

"The very object of the evidence is to invalidate the paper as a record. If that can be successfully done, no statements contained therein have any force. If any such statements could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry. Recitals of this kind must be regarded like asseverations of good faith in a deed, which avail nothing if the instrument is shown to be fraudulent. * * *

"On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provision of the Fourth Article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself. * * *

"The seizure in this case, as specially found by the jury, was not made in Monmouth County; but the justices who tried the case were justices of that county. Consequently the justices had no jurisdiction and the record had no validity."

Thompson v. Whitman has been cited many times, and approved as conclusive of the right collaterally to question the jurisdiction of the court, notwithstanding the recitals of the record.

Knowles v. Gas Light Co., 19 Wall., 58.
Hall v. Lanning, 91 U. S., 160.
Penoyer v. Neff, 95 U. S., 714.
Cole v. Cunningham, 133 U. S., 107.
Simmons v. Saul, 138 U. S., 439.
Thormann v. Frame, 176 U. S., 356.
Bell v. Bell, 181 U. S., 175.

The right to question collaterally the jurisdiction of the court over the subject matter of the suit or over the parties affected by it, necessarily involves an inquiry into the facts by virtue of which it is claimed jurisdiction obtained. If jurisdiction over the subject matter of the action is questioned, then the determination of that question involves an inquiry into the facts by virtue of which it is claimed the court got jurisdiction over the subject matter. Or if the courts jurisdiction over the parties is questioned, then the determination of that question involves an inquiry into the facts by virtue of which it is claimed the court got

jurisdiction. The right to question collaterally the jurisdiction of the court opens inquiry into all the facts upon which the jurisdiction is based. To this effect are all the federal decisions.

In *Simmons v. Saul, 138 U. S.*, 439, the court said, at page 448: "It is the settled doctrine of this court that the constitutional provision that full faith and credit shall be given in each state to the judicial proceedings of other states, does not preclude inquiry into the jurisdiction of the court in which a judgment is rendered over the subject matter of the parties affected by it, nor into the facts necessary to give such jurisdiction."

In the late case of *Thormann v. Frame, 176 U. S.* 350, the right to inquire into the facts necessary to give jurisdiction was referred to by the court as "thoroughly settled."

In the still later case of *Bell v. Bell, 181* U. S., 175, the court not only followed the established rule that "the recitals in proceedings in Pennsylvania of the facts necessary to show jurisdiction may be contradicted," but also, after inquiring into the truth or falsity of these recitals, approved the findings of the trial court that the recitals were false, and that the divorce in question was void.

In this case, therefore, it was not merely proper for the defendant collaterally to question the jurisdiction of the Ohio court, but also to question every fact essential to that court's jurisdiction. And if on the trial it should appear that in all the facts necessary to constitute jurisdiction a single essential fact was wanting, then the Court must find the Ohio court was without jurisdiction, and for that reason its judgment a nullity.

2. That the Plaintiff in the Ohio suit was the holder of the Wiley note, was a fact essential to the Court's jurisdiction. If the Plaintiff was not the holder, then the Ohio Court had no jurisdiction.

(*a*). The warrant of attorney contained in the note was as follows (p. 70):

"And hereby authorize N. L. Brewer, or any attorney at law in the United States, or elsewhere, to appear before any court of record, after the above note becomes due and waive the issuing and service of process, and confess judgment against us or any or either of us, *in favor of the holder of this instrument*, for the amount then appearing due together with costs of suit, and thereupon to release all errors, and writs of errors, and waive all right to appeal, and stay of execution, in our behalf or in behalf of either of us."

By this warrant of attorney, the attorney's authority was limited to a confession of judgment "in favor of the holder of this instrument." He could not confess judgment in favor of one who was not the holder.

(*b*) These warrants of attorney are strictly construed.

Warrants of attorney such as this are unknown to Nebraska jurisprudence. Judgment entered upon them in the Courts of other States, however, are by comity and by virtue of the federal constitution there recognized as valid. But neither comity nor the constitution requires the Nebraska courts to give a more liberal construction to the judgments of courts of other states or to warrants of attorney by virtue of which they are entered than do the courts of the state where the judgments were rendered.

In Ohio, these powers of attorney have been recognized and enforced; but the judgments rendered in pursuance of them have never been held good except when it was made clearly to appear that the authority

contained in them had been strictly pursued. Nor has the warrant been held to confer any authority not strictly within the letter of the language used.

Spence v. Emerine, 46 O. S., 433, is the leading case in Ohio involving a construction of warrants of attorney such as this. And it was there laid down as "an established principle that an authority given by warrant of attorney to confess judgment against the maker of the note must be clear and explicit, and strictly pursued, and we cannot supply any supposed omissions of the parties. Cushman v. Welsh, 19 Ohio St., 536; Cowie v. Allaway, 8 T. R., 257; Henshall v. Matthew, 1 Dowling's Pr. Cas., 217; Foster v. Clagget, 6 Dowling's Pr. Cass., 524; The Manufacturers' and Mechanics' Bank of Philadelphia v. St. John, 5 Hill, 497. In all cases of special agency, an agent constituted for a particular purpose and under a limited power cannot bind his principal if he exceeds that power. The special authority must be strictly pursued. * * * The decisions have all been based upon a strict interpretation of the power granted, without aiding any omission or defect in its terms by liberal intendment or construction.

"In accordance with the view which we have expressed, our conclusion is, that the warrant of attorney attached to the note sued on, did not authorize a confession of judgment in favor of defendant in error, and there having been no summons or other notice to the plaintiff in error of the bringing of the original action, the court of common pleas acquired no jurisdiction over the person of the plaintiff in error, and erred in rendering a judgment against him."

It will be noticed that the judgment of the lower court in the above Ohio case was reversed because the judgment was void, the trial court "having acquired

no jurisdiction." The want of jurisdiction in that case arose from the fact that the warrant of attorney did not give express authority to confess judgment in favor of the holder, and the holder in that case, as in this, was the purchaser of the note. The court, having ascertained that the person in favor of whom the judgment was confessed was a person for whom the attorney could not, under the terms of the power, confess judgment, did not hesitate to declare the judgment void for want of jurisdiction.

And so in this case, the court having determed that the plaintiff in the Ohio suit was not a person in whose favor Wiley authorized the attorney to confess judgment against him, did not hesitate to declare the Ohio court without jurisdiction and the judgment void. For this holding the Nebraska court had the high authority of the Ohio court, as well as the plain meaning of the terms of the power itself.

The views of the Ohio courts, in construing warrants of attorney or powers to confess judgment, conform to the decisions of all the states. There is an unbroken uniformity of decisions strictly construing powers of this kind.

Cahn v. Lessor, 72 N. W., 739, (Wis. Oct. 1897)
Morris v. Bank, 67 Texas, 602.
Bank v. St. John's, 5 Hill, 497.

(*c*) Looking now at this warrant of attorney just as it is, and construing it in the light of established rules of strict construction applicable to such instruments, we clearly see that the attorney was not Wiley's attorney except as between Wiley and the holder of the note. Hence, if the plaintiff was not the holder of the note, the attorney was not Wiley's agent and could not give the court jurisdiction over him.

The question, therefore, as to whether or not the plaintiff was the holder of the note was open to inquiry in this suit, because it was a necessary prerequisite, a condition precedent, to the Ohio courts jurisdiction that the plaintiff in the case should be the holder of the note. This was an essential element in the facts constituting jurisdiction. And if that element was wanting then so was jurisdiction wanting.

Suppose, for instance, some one other than John Bender or an attorney at law, a butcher if you please, had assumed to confess judgment against Wiley on this note, would not that question have been open to collateral inquiry in a suit against Wiley on the judgment so confessed? Would it not have been open to Wiley to say that the court had no jurisdiction over him because this person assuming to confess judgment against him was neither John Bender nor an attorney at law, and therefore not of his appointment, not his agent, nor authorized to act for him?

But a particular agent or a person belonging to a class any one of whom may act as agent, is not an agent except to do the very thing for the very person designated in the letter of his appointment. Suppose A appoint B to sign A's name to a promissory note payable to the order of C, and in place of doing so B signs A's name to a promissory note payable to the order of D, will the note be A's note? Can D collect it of A? Will it not be open to A to say B was not his agent? Will B not be guilty of a forgery?

Confusion must not be allowed to come into this case because the agent appointed was one of a class and the person in whose behalf he was authorized to act was not designated by a specific name but was designated by the word "holder." The word "holder" is as specific and well defined in respect of negotiable

paper as is a proper name in respect of the designation of a particular person. The holder of the note is " the owner thereof, one who in good faith acquired the same for a valuable consideration ".

Randolph on Com. Paper, Vol. 1, Sec. 14 and note.

Now suppose Wiley, in place of authorizing the attorney to confess judgment against him in favor of the holder, had authorized him to confess judgment against him in favor of John Smith, and under that authority the attorney had assumed to confess judgment against him in favor of the National Exchange Bank, would the attorney have been Wiley's agent? Would the Court have had jurisdiction over Wiley? Would it not have been open to Wiley collaterally to assert and maintain in an action on such a judgment that he was not in court; that he had appointed an attorney to confess judgment against him in favor of John Smith, but never appointed an attorney to confess judgment against him in favor of National Exchange Bank? Or must he now remain silent, is his mouth forever closed to assert the truth, because some one whom he never appointed to act as between him and National Exchange Bank has assumed to act for him and induced a court to spread on its records the form of a judgment against him? Are persons and property conclusively bound because judgment forms are spread on court records? If so, then I can imagine no devise so convenient and powerful as the Courts of Justice for the successful perpetration of imposition and fraud.

The limitation of the agent's authority to confess judgment against Wiley in favor of the holder of this note was not made without a purpose. It cannot be assumed that the makers of this note intended to give

currency to an instrument that if the plaintiff's claim here is true might well work their financial ruin. It must be assumed that when they said holder they meant holder. If they did not, if they meant that any one not the holder might get any attorney at law to confess judgment against them on the note, then might this instrument be used as the basis of as many judgments against them as there were dishonest persons to be found to take the note and have judgments forms entered against them in the courts. Why, sirs, if this is the case, and the effect of judgment so entered is what the plaintiff claims it is, then with such an instrument, by successive judgments, the richest man to be found anywhere could be financially ruined by obtaining his name to a note like this. The amount that could by it be filched from him through the power of the Courts, would, like the value of money, merely depend upon the rapidity of the note's circulation through the courts.

No, when the makers of this note said holder they meant holder. They meant to appoint an agent to confess judgment in favor of a specific person. If he acted for someone who was not the holder he was not their agent, any more than that B, who had authority to sign A's name to a note payable to C, was not A's agent to sign his name to a note payable to D, or than that an agent authorized to confess judgment in favor of John Smith was not an agent to confess judgment in favor of National Exchange Bank.

(d) But the plaintiff, compelled by the jury's verdict to admit that it was not the holder of this note and therefore that the attorney was not of Wiley's appointment and not his agent, nevertheless insists that, although the Court did not have jurisdiction over Wiley, he cannot now say so; that this person who was not

his agent and had no power to act for him could so act anyhow as that Wiley cannot now question the jurisdiction of the court.

I am not quite sure I clearly grasp the plaintiff's position here. I understand the plaintiff to admit that the jurisdiction of the Ohio Court may be collaterally attacked. In its brief, the plaintiff quotes as good law that part of the court's opinion in *Teel v. Yost, 128 N. Y.*, 387, where it is said that "the defendant may disprove the authority of such attorney to appear for him." The plaintiff refers to *Simmons v. Saul, 138 U. S.*, 439, where the court declared "it is the settled doctrine of this court that the constitutional provision that full faith and credit shall be given in each state to the judicial proceedings of other states, does not preclude inquiry into the jurisdiction of the court in which a judgment is rendered over the subject matter of the parties affected by it, nor into the facts necessary to give such jurisdiction," as "decisive of the case at bar." And yet the plaintiff seems to claim that Wiley could not "disprove the authority of such attorney to appear for him," nor go into the facts necessary to give the Ohio court jurisdiction.

I imagine one ground of our disagreement here arises from our different understandings of the meaning and importance of the word holder in this warrant of attorney, and of the scope of the Ohio judgment as an adjudication.

The plaintiff claims, on the one hand, it was necessarily adjudicated as a fact in the Ohio case that the plaintiff there was the holder of the note, and that therefore that question is not now open to inquiry in this suit.

The defendant claims, on the other hand, that "holder" in respect of this note had a two-fold mean-

ing and importance: first, was the plaintiff the holder of the note for the purpose of ascertaining whether the attorney was Wiley's agent to the end that the agent could give the court jurisdiction over Wiley—that is, did this essential fact exist necessary to give the court jurisdiction; second, was the plaintiff the holder of the note to the end that, after the court acquired jurisdiction of the parties, it would render judgment for the plaintiff? It is the first of these two meanings of the word holder as it bears upon this case that we are concerned with here, not the second. If the plaintiff was the holder of the note and therefore the attorney Wiley's agent, then the court acquired jurisdiction of the parties, and what it did after it got jurisdiction Wiley could not now question. But if the plaintiff was not the holder of the note, and, therefore, the attorney not Wiley's agent, then the court did not have jurisdiction of the parties, and Wiley may now question all that it did.

Nor could the court by anything it did conclude Wiley from questioning this fact in that sense in which its existence was essential to the court's jurisdiction over him. The Court could not by its own finding give itself jurisdiction, or prevent Wiley from denying that it had jurisdiction. As Mr. Justice Bradley said in *Thompson v. Whitman*, "The very object of the evidence is to invalidate the paper as a record. If that can be successfully done no statements contained therein have any force. If any such statement could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry."

Until the court got jurisdiction it had no power to act. To say that because the court must have found the plaintiff was holder of the note in the sense that

the existence of that fact was necessary to give the court jurisdiction, begs the whole question here.

Suppose the jurisdiction of the Ohio Court, in place of depending upon the fact that the plaintiff in the suit was the holder of the note, were based upon due and personal service of summons, the record containing a recital that the Sheriff of Seneca County had personally served Wiley with summons within that county,—would Wiley be concluded by the record and judgment if the recital of the service of summons essential to the court's jurisdiction was false?

Thompson v. Whitman and all the federal cases hold that he would not. Why not? Why, because if the Sheriff's return was false, then the court, as matter of fact, not having jurisdiction over him, would not have jurisdiction to make the very recital Wiley was now drawing in question. That the court seemed to have jurisdiction and recited that it had acquired jurisdiction, could have no conclusive binding force on Wiley because he was not in court. And so it is with the question as to whether or not the plaintiff was the holder of this note. That was a fact necessary to give jurisdiction.

"The facts necessary to give such jurisdiction may always be questioned."

Thompson v. Whitman, 18 Wall, 457.
Knowles v. Gas Light Co., 19 Wall., 58.
Hall v. Lanning, 91 U. S., 160.
Penoyer v. Neff, 95 U. S., 714.
Cole v. Cunningham, 133 U. S., 107.
Simmons v. Saul, 138 U. S., 439.
Thormann v. Frame, 176 U. S., 356.
Bell v. Bell, 181 U. S., 175.

Therefore, the question as to whether the plaintiff was holder of the note was open to question. It lay

at the threshold of the court's jurisdiction. It was a fact necessary to give jurisdiction.

(e) Again. The plaintiff insists at page 22 of its brief that "Whether or not the plaintiff was the holder of the note is not a jurisdictional question, but is instead a quasi-jurisdictional question, and the judgment of the Ohio court is conclusive thereon," and cites a number of cases claimed to be authority for this proposition.

I am satisfied the plaintiff and myself do not agree about what the distinction is between a strictly jurisdictional question and a quasi-jurisdictional question. Nor do I believe I clearly enough understand the plaintiff's views on this distinction fairly to state them here.

I claim that any fact essential to the jurisdiction of the court over the subject matter of the action, or over the parties to the suit, is strictly a jurisdictional question; that any fact not essential to the jurisdiction of the court over the subject matter of the action, or over the parties to the suit, but merely going to some preliminary fact necessary to be proven to authorize the court to act, such as diverse citizenship or the amount in dispute in the federal courts, are quasi-jurisdictional facts. In other words, all facts essential to the court's jurisdiction over the person or the thing are strictly jurisdictional; but the court, having acquired jurisdiction over the person or the thing, then has jurisdiction to pass on all other jurisdictional questions, because they are not strictly jurisdictional, they are only quasi-jurisdictional.

Let me illustrate my understanding of this distinction by some adjudicated cases containing examples of strictly juristictional and of quasi-jurisdictional facts.

The following cases, on the one hand, involved strictly jurisdictional questions,—

Penoyer v. Neff, 95 U. S., 714, as to whether or not service of process within the state was essential to the validity of a personal judgment.

Griffith v. Frasier, 8 Cranch., 9, as to the validity of the appointment of an administrator of the estate of a living person.

Wise v. Whithers, 3 Cranch.s 331, as to the validity of a sentence by a court martial against a person not in the military service.

Rose v. Himley, 4 Cranch., 214, as to the validity of a judgment in proceedings *in rem* where the *res* was not seized within the balliwick.

Galbin v. Pays, 18 Wall., 350, as to the validity of a decree charging the property of an absent defendant where publication has not been made in strict accordance with the statute.

Clark v. Clark, 178 U. S., 186, as to the validity of title claimed under the inheritance laws of one state to lands lying in another state.

The questions in all the foregoing cases involved the jnrisdiction of the court over the person or over the thing. Hence, they were all strictly jurisdictional questions.

Examples of quasi-jurisdictional questions on the other hand, questions, namely, constituting merely preliminary facts necessary to be proven, not for the purpose of giving the court authority to bind the person or the thing, but to set the machinery of the law in motion and authorize the court to act after jurisdiction of the person or of the thing has been acquired, are the following,—

Averments of diverse citizenship necessary to give the Federal courts jurisdiction.

Des Moines v. Iowa, 123 U. S., 552.

The existence and amount of the debt of a petitioning debtor in an involuntary bankruptcy.

Mickle v. Post, 21 Wall., 398.

The fact that there is sufficient personal property to pay the debts of a decedent when application is made to sell his real estate.

Comstock v. Crawford, 3 Wall., 396.

The fact that one of the heirs of an estate had reached his majority when the act provided that the estate should not be sold if all the heirs were minors.

Thompson v. Tolme, 2 Peters, 157.

The question as to whether or not a contract gave certain trustees the powers the court found it gave them.

Reinach v. Atlantic, &c., R. Co., 43 Fed., 83.

The question as to whether or not the courts of another state were right in discharging a contract there made.

Betts v. Bagley, 12 Pick., 572.

The question as to whether or not the domicile of a decedent was within the state so as to authorize the issuance of letters of administration, the property itself being within the state.

Holcomb v. Phelps, 16 Conn., 132.

When the parties are in court and the jurisdiction depends on a fact litigated in the suit, and is adjudged in favor of that party who avers the jurisdiction.

Wright v. Douglas, 10 Barb., 97.

Simmons v. Saul, 138 U. S., 439, which the plaintiff declares "is decisive of the case at bar," is a good illustration of the distinction between strictly

jurisdictional and quasi-jurisdictional questions. In that case, the property in question as well as the domicile of the decedent was within the jurisdiction of the court. The court had jurisdiction over the thing. Thereupon, having acquired jurisdiction over the thing, its subsequent acts in disposing of it were at most quasi-jurisdictional. And such was the ground of the court's decision. Mr. Justice LAMAR for this court said:

"The jurisdiction over the subject matter having attached, any informalities as to notices, advertisements, etc., in the subsequent proceedings of the court cannot oust that jurisdiction. They are at most errors which could be corrected on appeal, or avoided in a direct action of annullment as expressly provided in the articles of the Code cited above, but cannot be made the ground on which the decree of the court can be collaterally assailed."

But these quasi-jurisdictional questions bear no resemblance to the question involved in this suit. The question involved here is, Did the court have jurisdiction over Wiley? Was Wiley ever in court? Did the facts exist essential to the court's jurisdiction over the person? This, therefore, was not a quasi-jurisdictional, but a strictly jurisdictional, question.

Hence, in conclusion on this point, this case, like all other cases, is one where the facts necessary to give the court jurisdiction over the person may always be questioned. Neither the record, nor presumptions from the record, can conclude inquiry into the question of jurisdiction.

The plaintiff went into court with a warrant of attorney authorizing any attorney at law to confess judg-

ment against Wiley in favor of the holder of the note, and no one else.

This warrant of attorney is one of a class of instruments having an unfavorable standing before the courts. The powers it confers are strictly construed. The special authority it gives must be strictly pursued.

Looking then at the warrant of attorney just as it is, construing it according to the rules of strict construction applicable to such instruments, the attorney was Wiley's agent as between Wiley and the holder of the note only. If the plaintiff was not the holder of the note, the attorney was no more Wiley's agent than was B who was A's agent to sign A's name to a note to C, for that reason A's agent to sign A's name to a note to D; nor than an agent authorized to confess judgment in favor of John Smith was on that account an agent to confess judgment in favor of National Exchange Bank.

Nor is Wiley concluded by the judgment of the Ohio court. The fact he here contests is a fact necessary to give the Ohio court jurisdiction over the person. Therefore it is a strictly jurisdictional fact which may always be questioned.

This strictly jurisdictional fact, thus fairly in issue and fairly submitted to the jury, was on an overwhelming weight of evidence found against the plaintiff. Hence, the judgment here is right, for on this note Wiley has not had his day in court.

IV.

Even if the court erred in its instructions to the jury as claimed, the error was without prejudice; for if the plaintiff's judgment was valid, it was a joint judgment against Wiley and Wiley Construction Company. Hence the plaintiff could not maintain this suit against Wiley alone.

1. The sixth paragraph of the defendant's answer is as follows:

"This defendant further says, upon information and belief, that whatever judgment, if any, purports to have been rendered in Seneca County, Ohio, upon said note, was not against them severally, nor against them one as principal and the other as indorser or surety.

"Wherefore the said plaintiff ought not now to be permitted to maintain this suit."

When the plaintiff offered the transcript of its judgment in evidence (Ex. 1) the defendant made the following objection (p. 20): "The defendant objects to the introduction of Exhibit 1 because Exhibit 1 is not responsive to the pleadings. The petition alleges a judgment against Wiley. Exhibit 1 purports to show a joint judgment against the Wiley Construction Company and S. L. Wiley. Such a judgment cannot be made the basis of a separate action against one of the named debtors."

Therefore, the point now made was clearly brought before the trial court, and in spite of it the plaintiff elected to proceed with its case against Wiley alone, as originally brought.

2. If the transcript from the Ohio court shows a judgment at all, it is a joint judgment against Wiley Construction Company and S. L. Wiley.

The petition in the Ohio Court (p. 81) was against Wiley Construction Company and S. L. Wiley. It charged that "the defendants" executed and delivered to the plaintiff the note in question with the warrant of attorney annexed.

"Wherefore plaintiff prays judgment against said defendants," &c.

The answer in the Ohio Court (p. 83) purported to "enter an appearance for said defendants," and "confess judgment in favor of said plaintiff against said defendants." The findings of the Court (p. 83) referred to the petition and the answer of said defendants. Wherefore it was "considered that said plaintiff recover of said defendants the sum of $11,419.68," and costs.

In the entire proceeding, therefore, in the Ohio court, Wiley Construction Company and S. L. Wiley were referred to by the same word, as "defendants." They were treated together and precisely alike. The judgment purports to be, and if it is a judgment at all it is, a judgment against both of them jointly.

3. A joint judgment cannot be made the basis of a separate suit against one of the judgment debtors.

First National Bank v. Hamor, 63 Fed., 36.
Watson v. Steineu, 33 A., 4 (R. I. 1895).
Knapp v. Abell, 10 Allen, 485.
Mann v. Edward, 138 Ill., 19.
Smith v. Smith, 17 Ill., 481.
Donnelly v. Graham, 77 Pa. St., 274.
Holbrook v. Murray, 5 Wend., 161.
Dark v. Goss, 24 Mich., 265.
Sheehan v. Sims, 28 Mo. Ap., 64.
Lawrence v. Willoughby, 1 Minn., 65.

One reason for the rule that all judgment debtors must be made defendants to a suit on a joint judgment is, that a defense available to one of them constitutes

also a complete defense for all. Suppose, for instance, the Wiley Construction Company had been made a party defendant to this suit, and had pleaded and proved that the Ohio Court had no jurisdiction over it, or that it had paid the plaintiff's judgment, or that it had obtained a release from liability, or that for any other reason the plaintiff could not recover against it on this judgment; then the judgment being joint, the defense maintained by Wiley Construction Company would have been available as a defense to Wiley. The Wiley Construction Company may have some defense to this judgment that Wiley has not, or does not know about. If so, Wiley is entitled to the benefit of that defense.

This rule that all judgment debtors must be made defendants to a suit on a joint judgment, and the reasons for the rule, are clearly stated by JUDGE HANFORD in a case precisely like this, as follows:

"The complaint alleges judgments recovered against the defendant alone in actions wherein the plaintiff and the defendant, George D. Hamor, were the plaintiff and defendant. The transcripts show judgments in favor of the plaintiff and against both defendants in three actions in which the plaintiff was plaintiff and George D. Hamor and one E. Kuntz were defendants. The judgments appear to have been entered by the prothonotary upon promissory notes made by one H. Loeb to Hamor and Kuntz, and which notes were, by indorsements thereon, assigned by George D. Hamor and E. Kuntz to the plaintiff, and by the same endorsements the assignors jointly guaranteed the payment at maturity, and empowered any attorney of any court of record to confess judgment against them for the sums named in the notes, with 5 per cent. attorney's fees. The contracts of assignment, guarantees of pay-

ment, and warrants to confess judgment, created as to each of the notes a joint liability; and the judgments entered thereon are against the defendant and E. Kuntz, and do not in anyway change the position of the parties, or create any several or new liability. The record in this case and the evidence fails to disclose that Kuntz has died, if such be the fact, or that there is any reason for not joining him as a party defendant. If he has paid the debt, or been released, or has any valid defense, the same should be as available to the defendant as it would be to him. For this reason the variance between the allegations of the complaint descriptive of the judgments sued upon and the proofs introduced cannot be deemed immaterial or unimportant. City of Detroit v. Houghton, 42 Mich. 459, 4 N. W. Rep., 171, 287; Mace v. Page, 33 Mich. 38; Cunningham v. Hobard, 7 Gray, 423; Dibrell v. Miller, 29 Amer. Dec. 126. There is a total failure to prove the existence of the judgments described, and it would be unjust for the plaintiff to recover upon proof of other and different judgments, not mentioned in the complaint, especially as there could be no recovery against this defendant alone in an action with proper pleading conforming to the proofs."

First Nat. Bank v. Hamor, 47 Fed., 36.

And so, in this case, "there is a total failure to prove the existence of the judgment described" in the plaintiff's petition. The plaintiff averred that it had recovered a judgment against Wiley. It has exhibited no evidence of a judgment against Wiley. All the evidence it produced was of a joint judgment against Wiley and Wiley Construction Company.

In *Watson v. Steinau*, 33 A. 4 (R. I., 1895) the only point stated in the syllabus was as follows:

"A judgment of a foreign state, against several defendants jointly, in an action in which one of them was not served with process, cannot, in Rhode Island, be enforced against one of such defendants who in the foreign action was served with process."

And in the body of the opinion the Court stated its conclusion as follows:

"The rule which is established by the preponderance of authority is, that the plaintiff who sues on a judgment must recover against all of the defendants or none; for, the judgment being an entirety, whatever constitutes a good defense for one of the defendants operates also for the benefit of the others. Hall v. Williams, 6 Pick, 232; Oakley v. Aspinwall, 4 N. Y., 514; Richards v. Walton, 12 Johns, 434; Holbrook v. Murray, 5 Wend., 161; Rangeley v. Webster, 11 N. H., 299; Knapp v. Abell, 10 Allen, 485; Buffum v. Ramsdell, 55 Me., 252; Hulme v. Janes, 6 Tex., 242; Brockman v. McDonald, 16 Ill., 112; Williams v. Chalfant, 82 Ill., 218; Winslow v. Lambard, 57 Me., 356; Burt v. Stevens, 22 N. H., 229; Donnelly v. Graham, 77 Pa. St., 274; St. Louis v. Gleason, 15 Mo. Ap., 25; Wright v. Andrews, 130 Mass., 149; Pratt v. Dow, 56 Me., 88."

Whether, therefore, there was an error on the trial of this case or not, there is no evidence to support the plaintiff's claim, and so the plaintiff has not been prejudiced.

Respectfully submitted,

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3 March, 1904.